

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration between:

**FRATERNAL ORDER OF POLICE,
LODGE No. 5**

-AND-

**AWARD
AND OPINION**

CITY OF PHILADELPHIA, PA

Docket No. 14 390 0524-10
(PO Gerald R. Smith Jr. PR [REDACTED] - Discharge,)
.....

BEFORE: ERNEST WEISS, ARBITRATOR

APPEARANCES: For the Union: THOMAS W. JENNINGS, ESQ.
 JENNINGS SIGMOND, P. C.

For the City: SHANT H. ZAKARIAN, ESQ.
 ASSISTANT CITY SOLICITOR

ISSUE: Was the grievant, P/O Gerald Smith #2544 PR [REDACTED],
discharged for just cause effective February 28, 2010 and if not, what
shall be the remedy?

PRELIMINARY STATEMENT

Having been selected in accordance with the provisions of the Collective Bargaining Agreement between the parties, I conducted an arbitration hearing on December 7, 2010, at the offices of the American Arbitration Association in Philadelphia, PA, at which time the parties were afforded an opportunity to present evidence and argument in support of their respective positions.

However, when the City attempted to call the grievant's spouse to testify, the Union objected. A dispute arose regarding an existing Pennsylvania spousal privilege in testifying against an actively married spouse. After hearing oral arguments on this issue from both parties at the hearing before me, I requested and timely received and considered written arguments and legal citations on the spousal privilege question from both parties.

A thorough review of the written arguments and the documentary evidence supplied in their post-hearing submissions, I concluded that **42 Pa. C.S. 5924** is clear and unambiguous where it states that "(a) General rule – **In a civil matter neither husband nor wife shall be competent or permitted to testify against each other.**" I found nothing in the list of exceptions that would permit the grievant's spouse to testify against her now husband. Consequently, my deferred ruling on this issue is that the now Mrs. C [REDACTED] S [REDACTED] may not testify against her husband Gerald R. Smith Jr. in the herein arbitration. Therefore, the request by the City to reopen the hearing to permit the testimony is hereby denied.

POSITION OF THE CITY

The City argued in relevant part that the grievant was discharged for just cause. Lieutenant D [REDACTED] M [REDACTED] testified in relevant part that on February 18, 2009 at approximately 2:30 AM, he served a PFA order obtained by Corporal H [REDACTED] against the grievant. He found the grievant asleep at his residence, served

him the PFA and received his duty weapon. After completing an incident report Lieutenant M [REDACTED] and another officer left with the grievant.

P/O W [REDACTED] N [REDACTED] testified that on February 18, 2009 the grievant asked him to serve a PFA to Corporal H [REDACTED]. He further stated that when he was serving the PFA he observed that she was twitching with her eye but he saw no injuries. He completed the Incident Report, C2 in evidence, and departed.

Lieutenant Raymond Saggese of Internal Affairs testified in part that he investigates domestic affairs. He stated that he interviewed the complainant herein via computer and concluded that a domestic assault occurred. However, under cross examination he agreed that he does not know personally how she received her injuries if any.

Teresa T. Levins of Internal Affairs who supervised the instant investigation also testified that she was familiar with the facts and believed that Corporal H [REDACTED] was abused by the grievant. However, she agreed under cross examination that the PFAs had not been enforced or heard by a judge, since they were withdrawn.

Charles Ramsey, Commissioner of Police, testified that he was on duty on February 18, 2009. He read the grievant's file and reviewed the recommendations. He also considered the existing PFAs as well as the previous settlement reduced to a 15-day disciplinary suspension for abuse. However, he stated that he was not informed of the nature of the settlement agreement and he just learned at the hearing that Corporal H [REDACTED] and Officer Smith are now married.

In closing, the City argued that although the PFAs were not enforced in court they were an indication that domestic violence took place on a number of occasions. It pointed out that the grievant knowingly violated a PFA order when he attempted to enter his home with a police escort. Additionally, the grievant had been previously disciplined for engaging in domestic violence and therefore he had

proper notice of the consequences of such future unacceptable behavior.

The City concluded that the grievant was guilty of Conduct Unbecoming an Officer as charged and his discharge should be found to have been for just cause and the herein grievance denied.

POSITION OF THE UNION

The Union argued in relevant part that the City has not met its burden of proving the charges against the grievant. It stressed that the allegations of physical abuse allegedly committed by the grievant to his then fiancée are all heresy and therefore, may not be considered in the determination of his alleged guilt. The PFAs secured by both of them were apparently withdrawn since there is nothing in the record to indicate that they were taken to the next level to be enforced. Additionally, there is no medical documentation to indicate that any alleged injuries were medically treated.

The Union further argued that under Pennsylvania law there is "an absolute prohibition of incompetence preventing one spouse from testifying against the other during the existence of a valid marriage," (*Commonwealth v. Borris*, 372 A.2d 451, 453) the Union insisted that while several exceptions to the privilege exist none are valid in this case. It further insisted that given the absence of the testimony of the now Mrs. S [REDACTED] the testimony of the City witnesses at the hearing, must be regarded as hearsay and not controlling in establishing the burden of proof required by the City.

The Union asks that the grievance be sustained and that the arbitrator find that the grievant was discharged not for just cause, reinstated with full back pay, benefits and the reference to his discharge be expunged from his employment record.

DISCUSSION AND OPINION

It has been frequently held in arbitration that, even in the absence of contract language, the Employer has a right to discipline an employee for off-duty misconduct away from the work place, particularly where it can be shown that the misconduct could have an adverse effect on the good image of the Employer serving the community.

In this instance, prior to his discharge effective February 28, 2010, P/O Gerald R. Smith Jr. and Corporal C [REDACTED] H [REDACTED] both employed by the Philadelphia Police Department, were knowingly involved in a romantic relationship since at least 2005. During this period, according to the record herein, there apparently were some angry encounters between the two of them resulting in the securing Protection From Abuse (PFA) orders several times by Corporal H [REDACTED] and on at least one occasion by the grievant, against Corporal H [REDACTED]. However, there were no allegations that any of their personal relationship encounters were directly job connected. All the incidents are claimed to have resulted from alleged domestic disputes between them, but there were also no allegations of criminal behavior.

Significantly however, their relationship apparently blossomed since they were married on April 13, 2010.

As a result, the central witness, who would have direct knowledge of the allegations against the alleged negative behavior of the grievant, is not permitted to testify against him since they are now married to each other, although the alleged abusive behavior occurred prior to their marriage. Consequently, as above stated, as a result of their marriage, the now Corporal C [REDACTED] S [REDACTED] is not competent nor permitted to testify herein against her husband in accordance with the statutory Pennsylvania Marital Privilege Title 42 Pa. C.S. 5924

However, in determining the just cause of the grievant's discharge, it must

be considered that, after what may have been a long and stormy courtship best known only to her, Corporal H [REDACTED] elected to become Mrs. S [REDACTED]. The obvious question arises that, if his behavior was truly intolerable during their courtship, would she have elected to marry him? Additionally, although there is no evidence of how harmonious their marriage has been in almost a year, there were no allegations of a PFA being issued involving their household since their marriage.

I thoroughly considered the testimony of the witnesses called by the City including the Commissioner. However, in the absence of the testimony of the then Corporal H [REDACTED] who was the alleged recipient of the alleged abuse, the testimony of the witnesses called by the City must be found to be hearsay, as argued by the Union and insufficient to meet the burden of proof by the City.

The fact that both officers were successful in securing PFAs against one another is, by itself, no proof that domestic violence actually occurred during their courtship and at what levels. Here it is interesting to note that in their capacity as police officers both apparently received Academy training to deal with violence and keep the peace in the community.

Significantly, the validity of their claims in securing the PFAs has not been established since none of them had been adjudicated. All the PFAs had apparently been withdrawn or expired without adjudication. Consequently, in the absence of the testimony of the now Mrs. S [REDACTED] the alleged recipient of the violence, I must find that the City had not met its burden of proving that there was just cause to discharge P/O Gerald R. Smith Jr.

Therefore, having thoroughly considered all the evidence including the arguments and allegations of both parties I have determined, for the above stated reasons that the discharge of P/O Gerald R. Smith Jr. was not for just cause and I make the following Award:

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Docket No. 14 390 00524 10
(P/O Gerald R. Smith, Jr. PR# [REDACTED] - Discharge,)
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The undersigned arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above parties, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

For the above stated reasons, P/O Gerald R. Smith, Jr. PR# [REDACTED] was discharged not for just cause effective February 28, 2010

The City is hereby directed to reinstate the grievant and make him whole with respect to his lost salary, benefits and the record of his discharge shall be expunged.



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ERNEST WEISS, ARBITRATOR

STATE OF: NEW JERSEY

COUNTY OF: SOMERSET

On this 2nd day of February, 2011, before me personally came and appeared Ernest Weiss, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed same.
NOTARY PUBLIC OF NEW JERSEY
My Comm. Expires May 3, 2015